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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 “AMY,” *et al.*,

14 Plaintiffs,

15 RANDALL STEVEN CURTIS,

16 Defendant.

Case No. 4:19 Cv 2184 PJH

DEFENDANT CURTIS’S MOTION FOR  
RELIEF FROM NONDISPOSITIVE  
PRETRIAL ORDER OF MAGISTRATE  
JUDGE

Date Filed: April 23, 2019

Trial Date: June 21, 2021

Before the Honorable Phyllis J. Hamilton  
Chief United States District Judge

Pursuant to 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, and Civil L.R. 72-2, Defendant Randall Curtis, by and through his counsel, files this Motion for Relief from Nondispositive Pretrial Order of the Magistrate Judge filed at ECF 161.

**THE MAGISTRATE COURT ERRED BY (1) FINDING THAT NO PLAINTIFFS POSSESSED DOCUMENTS RESPONSIVE TO DEFENDANT’S REQUESTS FOR PRODUCTION; (2) FINDING THAT JAMES MARSH IS NOT THE AGENT AND REPRESENTATIVE OF PLAINTIFFS AMY, JENNY, JESSICA, ERIKA AND TORI WITH RESPECT TO THESE REQUESTS; (3) REFUSING TO APPLY THE WAIVER OF OBJECTIONS BASED ON PLAINTIFFS’ FAILURE TO RESPOND TIMELY TO THE DISCOVERY REQUESTS; (4) HOLDING THAT DEFENDANT’S DISCOVERY REQUESTS DO NOT SEEK RELEVANT DOCUMENTS; AND (5) FINDING FACTS NOT SUPPORTED BY THE BRIEFING AND FOR NOT HOLDING A HEARING, WHICH AIDED THE MAGISTRATE JUDGE TO HIS ERRONEOUS RULINGS.**

### FACTS

On October 29, 2020, the last day on which a party could propound fact discovery, Defendant served his Request for Production of Documents, Set Two (“RFPs Set Two”), that set forth four requests aimed at obtaining documents Plaintiffs exchanged with members of Congress with respect to their years-long efforts to have Congress amend the statute, and then amend it again. *See* ECF 156-1, Ex. F (RFPs and Plaintiffs’ response).<sup>1</sup>

Plaintiffs’ presentations regarding their desire to change the statute is relevant to this case. *See* ECF 142 at 12:9-13:18 (arguing against bills of attainder); *see also id.*, at 10:11-17:10 (arguing that the presumption against retroactivity makes the predecessor version of the statute—“Masha’s law”—applicable to Defendant, rather than the current version of the statute that was amended in 2018, *viz.*, *after* Defendant’s conduct, *after* Defendant’s conviction, *after* Plaintiffs received notice that Defendant may have possessed images of them, and *after* Plaintiffs had raised claims against Defendant). In sum, after knowing Defendant’s alleged conduct and his identity, Plaintiffs Amy, Jenny, Jessica, Erika and/or Tori successfully lobbied Congress to amend 18 U.S.C. § 2255 and now seek to apply that amended statute against Defendant. According to

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<sup>1</sup> The parties agreed to the form of RFPs Set Two so that Defendant could direct each request at all 15 Plaintiffs on one pleading, and Plaintiffs thereafter could respond in one pleading. *See* ECF 160 at 1, n.1.

1 Plaintiffs, they and their counsel were instrumental in amending the statute with respect to  
 2 Masha's law, and amending it again with respect to the current version of the statute; this  
 3 evidence includes:

4 James R. Marsh, *Masha's Law: A Federal Civil Remedy for Child*  
 5 *Pornography Crimes*, 61 Syracuse L. Rev. 459, 461 (2011)  
 6 (Plaintiffs' counsel declaring: "In late 2005, I was instrumental in  
 7 enhancing the federal civil legal rights of children who are victims of  
 8 child pornography" and claiming credit for enactment of Masha's  
 9 Law);

10 ECF 94-5 (Declaration of James Marsh claiming that "[i]n 2017, I  
 11 assisted Senator Diane Feinstein in updating 18 U.S.C. 2255"); and  
 12 ECF 96-2 at Ex. 16 (at AMY000060) (In 2014, "Amy" lamenting her  
 13 loss in *Paroline v. United States*, 572 U.S. 434 (2014), and  
 14 expressing "hopes [that] the lingering problems will be solved by the  
 15 legislation that Mr. Marsh is working on."

16 As Mr. Marsh has attested *in this case*: he is "the lead attorney for the Plaintiffs known as  
 17 Amy, Jenny, Jessica, Erika and Tori in all matters concerning restitution in criminal matters as  
 18 well as in other civil matters." ECF 95-4 § 2. Further, he has "represented Amy since 2006,  
 19 Jenny since 2016, Jessica since 2013, and Erika and Tori since 2016 in matters concerning their  
 20 status as victims of child sex abuse image exploitation." *Id.* It is in that capacity that he lobbied  
 21 Congress with respect to amendments to section 2255, as well as other statutes. *See e.g.*, The  
 22 Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (AVAA), Pub. L.  
 23 115–299.<sup>2, 3</sup>

24 To be sure, Mr. Marsh's comments on this subject ultimately have assisted Defendant.  
 25 For example, Plaintiffs' counsel admitted in the referenced law review article that Defendant's  
 26 reading of Masha's law is correct, and that section 2255's elements requiring proof that any  
 27 particular Plaintiff (1) was a victim of a violation of 14 predicate offenses and (2) who suffers

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28 <sup>2</sup> "Vicky" now goes by "Lily" in this case.

<sup>3</sup> Respectfully, Plaintiffs' successful efforts to persuade Congress to amend the operative statute and then apply it against the Defendant they already had identified and made claims against, and document requests focused, in part, on Plaintiffs' representations regarding the limits of the prior statute, is "logically relevant" to Defendant's bill of attainder arguments and other challenges in this case. *See* 142. Defendant thus respectfully disagrees with, and objects to, the Magistrate Judge's contrary finding. *See* ECF 161 at 3:1-6.

personal injury as a result of such violation are *different*, and each must be proven to obtain damages, including the \$150,000 “floor.” Marsh, *supra.*, at 494-95. In a section counsel helpfully labeled “The Personal Injury Requirement[,]” he (1) admitted that “[i]n order to obtain statutory damages, a plaintiff must show that she suffered ‘personal injury’ as a result of the defendant’s predicate act[,]” which he recognized is “much more difficult to conceptualize and prove” in possession cases, amongst others, (2) agreed that plaintiffs must “prove[] personal injury” before being entitled to damages, including the \$150,000 “floor[;]” and (3) discussed his “*theory* that child pornography in and of itself causes personal injury” (citing *Ferber*). *Id.*, at 494-95 (emphasis added).

But when Plaintiffs’ responses to Defendant’s RFPs Set Two seeking this evidence came due on Monday, December 1, 2020, *see* Fed. R. Civ. P. 34, Plaintiffs did not even respond, much less produce responsive documents. *See* ECF 160. Then, when Defendant inquired of Plaintiffs in January 2021, Plaintiffs’ counsel suggested that because Defendant did not respond to an email query about the RFPs following service, Plaintiffs’ query by email somehow served to excuse Plaintiffs’ obligations under Fed. R. Civ. P. 34. But that is not the law. And after conference, Plaintiffs refused to provide *any* responsive documents based on the following objections:

Objection: beyond the scope of permissible discovery as not likely to lead to any admissible evidence; violative of Plaintiffs’ First Amendment rights to petition Congress as the compelled disclosure of communications as requested exerts a chilling effect on the exercise of those rights. Further, Defendant’s request is violative of California Code of Civil Procedure 425.16 which prohibits actions “. . . against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California constitution in connection with a public issue . . .”

*See* ECF 156 ¶¶ 2-5 & ECF 156-1 (Ex. F).

### ARGUMENT

The Magistrate Judge first erred by failing to give effect to Plaintiffs’ waiver of objections. The law is clear: Plaintiffs failure to respond timely to Defendants RFPs Set Two resulted in waiver of all objections, *including* claims of privilege and work product. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9<sup>th</sup> Cir. 1992). Thus, the magistrate

1 court should have disregarded Plaintiffs' untimely objections, and should have ordered  
2 production of all responsive documents forthwith and without exception.

3 The magistrate court's next errors arise from Plaintiffs' misleading presentation, and the  
4 court's failure to hold a hearing. While magistrate court found that Plaintiffs "do not possess"  
5 any responsive documents, ECF 161 at 1, that's not quite what Plaintiffs represented, and the  
6 court would have gotten to the heart of the matter had it held a hearing. Plaintiffs Amy, Jenny,  
7 Jessica, Erika and Tori do not deny that Mr. Marsh is their counsel (read: representative, attorney,  
8 and/or person acting on their behalf, *see* ECF 161 at 2 (reciting discovery scope of discovery  
9 request)), nor do they deny that Mr. Marsh lobbied Congress to change section 2255, (and with  
10 respect to Amy, twice), on their behalf. *See* ECF 160 at 3-6. While Plaintiffs carefully contended  
11 that Mr. Marsh's communications "had anything to do with either Mr. Curtis or this case[.]" *id.*,  
12 at 4, that's a dodge: it doesn't address (much less deny) whether he possesses documents,  
13 presented to and received from Congress pursuant to *his* representation of Plaintiffs Amy, Jenny,  
14 Jessica, Erika and/or Tori, that address the requested changes in section 2255 and the bases  
15 therefore. Thus, whether Plaintiffs Amy, Jenny, Jessica, Erika and/or Tori *personally* possess the  
16 responsive documents—the finding that animated the magistrate court's ruling, *compare* ECF 160  
17 at 4 *with* ECF 161 at 1—doesn't answer the question.

18 Mr. Marsh is their attorney, representative, and agent, has obtained discovery *in this case*  
19 pursuant to the Protective Order as Plaintiffs Amy, Jenny, Jessica, Erika and Tori's "Outside  
20 Counsel of Record," has previously searched for and provided responsive documents to  
21 Defendant *in this case* on Plaintiffs' behalf, hired Plaintiffs' expert witness and gave him  
22 directions *in this case*, and, along with another attorney from his firm, attended at least a portion  
23 of the depositions of expert witnesses *in this case*. *See e.g.*, ECF 146-5 at 66-67 & 196; ECF  
24 146-8 at Laws Depo. Exs. 00186; *see also* ECF 61 ¶ 3.3. Thus, as the attorney, agent, and  
25 representative of Plaintiffs Amy, Jenny, Jessica, Erika, and Tori, Mr. Marsh can and should be  
26 required to produce the responsive documents in his possession in that capacity. Most simply,  
27 where Plaintiffs' attorney, representative, and agent possesses responsive documents, Plaintiffs  
28 possess responsive documents. While Plaintiffs' carefully-constructed representations elided

1 over this point, the magistrate court erred in its conclusion. Most directly, James Marsh possesses  
 2 responsive documents that he obtained and maintains as Plaintiffs Amy, Jenny, Jessica, Erika, and  
 3 Tori's counsel, and thus those documents are required to be produced pursuant to Defendant's  
 4 Requests for Production of Documents. *See* Fed. R. Civ. P. 26. The Court should certainly  
 5 require Plaintiffs to address the magistrate court's error arising from their misleading  
 6 presentation.

7 Finally, Plaintiffs' objections—which do *not* deny possession by counsel of responsive  
 8 documents—are frivolous, and the magistrate court correctly did not credit them. In sum, after  
 9 bragging in multiple fora about their efforts to amend existing law, Plaintiffs claim—without  
 10 citation to any case—that producing the documents reflecting their interpretation of the old  
 11 versions of section 2255 and the need for serial amendments, Plaintiffs are suddenly shy, and  
 12 claim that producing evidence in a matter they brought would violate their First Amendment  
 13 rights to petition the Government. That is sophistry at best, and just plain obstruction. Nothing in  
 14 Defendant's RFPs Set Two infringes on Plaintiffs' rights, and Plaintiffs present zero authority to  
 15 support their waived objections. So too, the notion that these non-Californians can invoke  
 16 California state court procedural rules to avoid producing discovery in this federal matter borders  
 17 on the absurd, which also explains Plaintiffs' lack of supporting authority. Similarly  
 18 unsustainable is the notion that Defendant's RFPs Set Two constitute an “action[] ... against a  
 19 person” arising from their speech. Rather, RFPs Set Two are simply requests for documents in  
 20 possession of Plaintiffs' agent, representative, and counsel that inform the litigation of this matter.

21 The Court should thus sustain Defendant's objections and compel production of  
 22 responsive documents as requested.

23 Respectfully submitted,

24 COLEMAN & BALOGH LLP

25 /s/ E. A. Balogh

26 By: ETHAN A. BALOGH

27 Attorneys for Defendant

28 RANDALL CURTIS

DATED: February 18, 2021